(8)

No. 95-1621

IN THE

Supreme Court of the United States
OCTOBER TERM, 1995

HARBOR TUG AND BARGE COMPANY,
Petitioner,

v.

JOHN PAPAI and JOANNA PAPAI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1). Is there any factor that would deprive Respondent of seaman status under the Jones Act while working on a vessel in navigation pursuant to Petitioner's Deckhands Agreement

2). Does Respondent's receipt of compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) preclude him from also recovering as a seaman under the Jones Act.

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RESPONDENT'S BRIEF

COUNTER STATEMENT OF THE CASE

A. FACTS

This case arises from a knee injury sustained by Respondent John Papai while in the course and scope of his employment for Petitioner Harbor Tug and Barge Company (HTB) on board the tug *Point Barrow*. (Pet. App. 2a).

Papai worked at various maritime related jobs for various companies and obtained his maritime jobs through the hiring hall of the Inland Boatman's Union of the Pacific (IBU). He was not a permanent employee of HTB. HTB along with other companies is a party to a Deckhands Agreement with the IBU pursuant to which the vessels obtain their deckhands through the union. Apparently, there was no permanent crew on any of the vessels and assignments were made on a day-to-day basis. (Pet. App. 2a).

Papai had worked for HTB as a deckhand on twelve previous occasions in 1989, and on March 13, 1989, Papai was dispatched by the IBU hiring hall to perform maintenance for one day on HTB's tug *Point Barrow*, under the supervision of HTB's Port Captain.[1] (Pet. App. 2a).

Regardless of the work they might do on a particular day these deckhands were dispatched as crew members under the Deckhands Agreement and paid by Petitioner under the code "008." (Testimony of HTB Senior Port Captain Clinton, vol. 9, pp. 28-29).

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[1]Contrary to what is stated on p. 3 of Petitioner's Brief, this Port Captain was not "shoreside." He was in charge of the seagoing operation of the tug. (Testimony of HTB Senior Port Captain Clinton, vol. 9, p. 37). If he was a "shoreside" employee, his conduct would not be imputable to the vessel.

As it would be on any day when it was not assisting ships, the tug was manned only by the deck hands dispatched to maintain it. The engines were ready to run should the tug be needed to accomplish its mission. (J.A. 56).

Mr. Papai and Mr. Low, the other deckhand dispatched to the *Point Barrow* this same day, were provided with a ladder to do their work by the Port Captain. One end of it had been sawed off some days previously. After they had used this makeshift ladder together for about 3 hours, Mr. Low was assigned by the Port Captain to go to sea on another tug, leaving Mr. Papai to work unassisted. (J.A. 48-50).

Allegedly because there was no one to assist him by holding this sawed off ladder, Mr. Papai fell off it while climbing down it and was thereby injured. (J.A. 49-50).

B. PROCEDURAL HISTORY

In January 1990, Respondent John Papai filed his complaint against defendant Harbor Tug and Barge seeking damages under the Jones Act, 46 U.S.C.App §§688, *et seq.*, and for unseaworthiness under general maritime law. His wife, Respondent Joanna Papai, sued for loss of consortium.

HTB moved for summary judgment on the ground that Respondent John Papai was not a seaman within the meaning of the Jones Act and general maritime law. The District Court granted the motion on May 29, 1990.

Pursuant to leave of court, Papai filed a first amended complaint under Section Five of the LHWCA and for loss of consortium.

In denying reconsideration on the summary judgment, the District Court certified the question under 28 U.S.C. §1292(b) for interlocutory appeal, which was denied by the Ninth Circuit on October 30, 1990. The subject was then rebriefed and

reargued to the District Court in light of two recent Supreme Court decisions (*McDermott International, Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991)), and the District Court reaffirmed that Papai was not a seaman on the basis that he did not have the necessary permanent connection with the vessel.

Contrary to what is stated on p. 6 of Petitioner's Brief, Papai did not make a LHWCA claim "soon after his injury." Instead HTB started making voluntary payments under the LHWCA despite Papai's protests that he was a Jones Act seaman. (Pet. App. 34a).

It was only after the District Judge made his final determination in 1992 that Mr. Papai was not a seaman that he proceeded toward the formal award that was needed to finalize the compensation lien for the negligence trial that was to begin on August 31, 1992.

The reason why a formal award is necessary is the requirement that the lien be liquidated to a sum certain by the time judgment is entered.

At the June 2, 1992, hearing and in violation of well established principles of judicial estoppel outlined in *Roth v. McAllister Bros., Inc.*, 316 F.2d 143,145 (2d Cir. 1963), HTB took a position diametrically opposite to that which had won it partial summary judgment and asked the Administrative Law Judge (ALJ) to dismiss Papai's LHWCA claim on grounds that he was a member of a crew of a vessel under 33 U.S.C. §902(3)(G). Plaintiff's workers compensation attorneys failed to raise *Roth*, or the doctrine of equitable estoppel in response. With all due respect to the attorneys who filed the compensation claim, this was not good lawyering. The ALJ erroneously concluded that the prior summary judgment did

not estop HTB from changing its legal position because the District Court's ruling was still subject to appeal. However, the federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as *res judicata* or collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding *de novo*. 1B *Moore's Federal Practice* (2d ed.) ¶0.416[3.2] pp. III — 322 — 3 *see also, Hunt v. Liberty Lobby*, 707 F.2d 1493, 1497 (D.C. Cir. 1983). Unfortunately the ALJ ignored that rule, concluded all over again, without considering any evidence other than Respondent's testimony, that Mr. Papai was not a seaman, and issued a formal decision awarding him permanent disability LHWCA benefits in August of 1992. *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 205 (9th Cir. 1995). The ALJ cited *Wilander, supra*, but made no effort to measure Mr. Papai's situation against this Court's guidelines. Instead, he relied upon Benefits Review Board authorities to find that Respondent's assignment to any vessel or fleet of vessels was random, sporadic and transitory, and lacking in permanent connection so that Mr. Papai "could not be regarded as a member of the crew of any ship or fleet of ships." (Pet. App. p. 37a discussed at fn. 4 on p. 7 of Petitioner's Brief).

Sharp v. Johnson Bros., 973 F.2d 423 (5th Cir. 1992) which is the first and only circuit opinion that gives preclusive effect to an ALJ ruling was decided on September 25, 1992.

Papai's trial against HTB for negligence in the operation of the *Point Barrow* began on August 31, 1992, and the ALJ's formal order had been entered on August 27, 1992. Petitioner's Notice and Request for Allowance of Lien (J.A. 6) bears the same date, but was not entered on the trial court's minutes until September 2, 1992 and was not mentioned at any time during the trial.

By the time of oral arguments in conclusion of the trial, December 12, 1992, the sixty day deadline for appeal of the

ALJ formal order (i.e. October 27, 1992) had passed and no appeal had been filed.

When the trial judge observed on the record that Respondent was free to appeal his seaman status ruling, Petitioner did not call the trial court's attention to its view that the unappealed ALJ order precluded further litigation of the issue. Instead, this was not brought up until July 2, 1993, when Petitioner filed its Brief in the Ninth Circuit in opposition to Papai's appeal of the District Court's decision.

On December 12, 1992, after indicating that Papai was free to appeal the seaman status ruling, the District Judge found for defendant on the third-party action.

Papai appealed both the finding on non-seaman status and the finding against third party liability to the Ninth Circuit.

The decision below in the Ninth Circuit reversed on the issue of seaman status without reaching the merits of the third-party action, by finding that there was a triable issue of fact as to Papai's connection to the vessel under *Wilander, Gizoni* and *Chandris v. Latsis*, 115 S.Ct. 2172, 2183 (1995).

The decision below also held that Papai's litigation of his LHWCA claim did not bar his subsequent Jones Act claim, recognizing that a bar to relitigation would not serve the purpose for which it is usually employed because the parties are forced to take inconsistent positions under the Jones Act and LHWCA. (Pet. App. 12a).

There is no relevance to the fact that Respondent did not appeal the ALJ's decision in that a Respondent does not have

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[2]In so far as the decision below expanded upon the legal standards of *Chandris* to include employers beyond HTB, it is dictum because all of Papai's assignments, once he became a qualified deck hand (within the meaning of the IBU-HTB Deckhands Agreement) were with HTB.

standing to appeal the fact that an award has been made in his favor because he has not been "adversely affected by the award." *See, e.g. Simms v. Valley Line Co.*, 709 F.2d 409, 411 (5th Cir. 1983).

SUMMARY OF ARGUMENT

1. The decision below has correctly interpreted *Chandris* in concluding that the duties specified for workers dispatched under the IBU-HTB deckhands agreement show that it was certainly erroneous for the District Court to have decided seaman status against Mr. Papai by way of summary judgment.

Moreover, the identifiable group of vessels to which a worker must be connected to be a seaman may include vessels owned by more than one employer. But even if the decision below is incorrect in this regard, Mr. Papai still has the requisite connection because all of his 1989 assignments were with Petitioner under the IBU-HTB Deckhands Agreement.

2. This Court's recognition that the LHWCA and the Jones Act are mutually exclusive remedies does not mean that Congress intended that proceedings on one of these alternatives precludes the other. To give such meaning leads to an election of remedies.

The historical coexistence between damage suits and LHWCA remedies where, as here, the employer also owns the vessel shows that §905(a) of the Act was never intended to be absolute. Petitioner's reliance upon *Sharp* to support such an intention is misplaced because *Sharp*'s reasoning is based upon a misinterpretation of *Gizoni* combined with the Fifth Circuit's displeasure with the litigants' failure to inform it of significant developments in the pursuit of LHWCA remedies analogous to the present Petitioner's lack of candor toward the District Court as to the purported significance of the ALJ proceedings.

Even if there were an election doctrine and even if it could generally be applied to ALJ formal awards, it should not be applied herein due to the effect of four well settled exceptions to collateral estoppel, any one of which prevents the application of preclusive effect. They are: (1) the frequently expressed legislative intent that the LHWCA is designed to assist injured workers and to avoid harsh, incongruous results; (2) the requirement of actual litigation, which cannot be met, both because Petitioner had already obtained a favorable ruling by taking a contrary position and because the ALJ record is devoid of any indication that Petitioner introduced any evidence or made any arguments to show that Mr. Papai was a "member of a crew."; (3) the concept that an administrative decision cannot act to abridge a litigant's right to appeal an earlier decision on the same subject rendered by another tribunal; (4) a change in law subsequent to an administrative decision that affects its application in another tribunal entirely vitiates said application.

ARGUMENT

I. THERE IS NO FACTOR THAT WOULD DEPRIVE RESPONDENT OF SEAMAN STATUS UNDER THE JONES ACT WHILE WORKING ON A VESSEL IN NAVIGATION PURSUANT TO PETITIONER'S DECKHANDS AGREEMENT

Seaman status, which is required for recovery under the Jones Act, is a mixed question of law and fact. Nevertheless, it may be determined by summary judgment in appropriate circumstances. *Wilander*, 498 U.S. at 355-56, 111 S.Ct. at 817-18. By applying *Chandris* to the present facts, the decision below correctly concluded that this case did not present such a circumstance.

In essence the Deckhands Agreement amounts to an admission by Petitioner that Papai was a Jones Act seaman, not only on the day of the accident but on the 12 previous days in 1989 when he was assigned to work as a HTB deck hand.

It is entirely irrelevant that:

> Papai's jobs *with* HTB were transitory one or two day jobs that Papai obtained through the IBU hiring hall from time to time. Each of his jobs for HTB was self-contained not continuous. His work for HTB was sporadic and happenstance (Petitioner's Brief 41-42).

None of these facts puts Papai outside of *Chandris*. There is no evidence or even argument that Papai's duties were "essentially changed" during his 13 assignments pursuant to the Deckhands Agreement. His new work assignment occurred on January 1, 1989 when he began to be assigned by his union as a qualified deck hand under this agreement. Therefore these 13 assignments are the only work that should properly be considered in determining Mr. Papai's seaman status.

The facts that ". . . his work was day-to-day, and he lived, ate and slept at home" (Petitioner's Brief p. 42) do not make him "one of those land-based workers who have a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea."[3] Petitioner's Brief quoting from *Chandris*, 115 S.Ct. at 2190.

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[3]The "perils of the sea" test was originated with *Wallace*, *supra*, and is given substantially more weight by the *Chandris* dissent, 115 S.Ct. at 2194 and fn.2. However, the reasoning behind this doctrine has been termed "misguided" by *Cheavens, Terminal Workers' Injury and Death Claims*, 64 Tulane L. Rev. 361, 395-399 (1989), which says that the Jones Act and seaman's status is not ". . . a policy based on special perils encountered by seaman . . . " *Id.* at 397, text following fn. 179. The article collects data on "lost workdays" for various occupations that demonstrates

Petitioner's Brief quotes *Chandris* out of context in attempting to apply it to the present case. The next sentence after the language quoted above reads as follows (quoting from 1B. *A. Jenner, Benedict on Admiralty* §11, pp: 2-10.1 to 2-11 (7th ed. 1994):

> If it can be shown that the employee performed a significant part of his work on board the vessel on which he was injured, with at least some degree of regularity and continuity the test for seaman status will be satisfied.

Nowhere does *Chandris* speak of where the worker ate or slept or the length of his assignments as criteria for seaman status. It is the work that matters, and the total circumstances of that work are best defined by the Deckhands Agreement, where Petitioner describes Mr. Papai's duties. The pertinent parts read as follows:

> *Article 12. Maintenance and Cure*
>
> (a.) Crew members are entitled to maintenance and cure, on account of injury or illness incurred in the service of the vessel, and shall be paid maintenance at the rate of twenty-two dollars ($22.00) per day. Except in hardship cases, the

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that the work done by the core groups covered by the LHWCA is considerably more dangerous than that done by seamen on conventional deep sea ships and even more so when compared with Local Transportation Workers (such as Mr. Papai). *Id.* at 398, text accompanying fn 182. *Cheavens* concludes, as this Court should, that the ". . . .desire to look to exposure to peril of the sea as the litmus test of seaman status is not productive." *Id.* at 399. Moreover the adoption of such a litmus test carries a high potential for excluding inland towboat crew members from the Jones Act regardless of their connection to their vessels. It would also be entirely inconsistent with the time honored Congressional intent of the Jones Act to enact "a fault based compensation system" (to enforce) ". . . itinerant seaman's rights." *Cheavens*, *supra*, 64 Tulane L. Rev. at 398, top of the page.

Employer shall not be required to make payments under this rule more often than semi-monthly. (J.A. 73).

* * *

Article 23. Wages

* * *

(d.) In order to be employed as a qualified deckhand, he or she must provide, if requested to do so to the satisfaction of the Employer, that he or she:

1. Has good knowledge of vessels lines and towing winch, the placement, use and names of same.
2. Has fair knowledge of splicing lines.
3. Is a satisfactory helmsman and lookout.
4. Can satisfactorily chip, scale and care for the metal parts of a vessel.
5. Can satisfactorily paint when requested and do the necessary cleaning chores upon completion for the day.
6. Can properly care for and use tools.
7. Can do such other things required of a deckhand in order to work safely.

Any person who is classified as a qualified deckhand shall not be reduced in rating. (J.A. 75-76).

Article 30. Maintenance Work and Duties

(a.) During the time on duty the deckhand's duties shall consist of tying up and letting go as required

by the operation and normal maintenance work on the boat shall be performed during the hours of eight (8:00) a.m. to four (4:00) p.m. No maintenance work shall be required on Sundays or holidays.

(b.) Deckhands will be required to perform maintenance work in the engine room.

(c.) Sanitary work shall be performed as needed any time, but no unessential sanitary work shall be required on Sundays or holidays, or at night that could be deferred until the next day.

It is the considered opinion of all parties that each employee should adequately maintain his/her vessel within these limits. All employees shall share equally in this responsibility.

(d.) The on-watch deckhand shall conduct a check of the engine room status a minimum of two (2) times each watch while underway for vessel safety reasons and report same to the operator. (J.A. 77).

When these duties are measured against the guidelines of *Chandris*, there is no factor that would deprive Respondent of seaman status while working pursuant to this agreement.

These guidelines are as follows (115 S.Ct. at 2183):

> [W]e think that the essential requirements for seaman status are twofold. First, as we emphasized in *Wilander*, "an employee's duties must contribut[e] to the function of the vessel or to the accomplishment of its mission."

. . .

Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

* * * * * *

In our views, "the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon." *Wallace v. Oceaneering Intl.*, 727 F.2d 427, 432 (5th Cir. 1984). The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.

* * * * * *

> [S]eaman status is not merely a temporal concept, but we also believe that it necessarily includes a temporal element. A maritime worker who spends only a small action of his working time on board a vessel is fundamentally land-based and therefore not a member of the vessel's crews, regardless of what his duties are. Naturally, substantiality in this context is determined by reference to the period covered by the Jones Act plaintiff's maritime employment, rather than by some absolute measure.

Chandris, supra, 115 S.Ct. at 2191.

Thus, the inquiry is not whether Papai had a permanent connection with the vessel. The proper inquiry is whether Papai's

relationship with a vessel (or group of vessels) was substantial in terms of duration and nature, which requires consideration of the total circumstances of his employment. Scrutiny of the "total circumstances" is, necessarily, fact specific. On one hand, the status of a worker may change by a change in work assignment. On the other hand, it may be necessary to examine the work performed by the employee while employed by different employers during the relevant time period. As was stated by this Court in *Chandris*:

> [W]e see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer. . . . When a maritime worker's basic assignment changes, his seaman status may change as well. . . . If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position.

Id. at 2191-92.

The decision below found no reason that a group of employers who join together to obtain a common labor pool on which they draw by means of a union hiring hall (in this case, the IBU hiring hall), should not be treated as a common employer for purposes of determining a maritime worker's seaman status. If the type of work a maritime worker customarily performs would entitle him to seaman status if performed for a single employer, the worker should not be deprived of that status simply because the industry operates under a daily assignment rather than a permanent employment system. Under such circumstances, a maritime worker who regularly performs seaman's work is entitled to seaman status. Moreover, in the present case Papai actually worked for HTB on far more than a single occasion. In 1989, he worked for

that company on a dozen occasions over the two and a half month period preceding his injury. This circumstance should in itself provide a sufficient connection.

The "service with a particular employer" that Petitioner's Brief (pp. 31-39) attempts to limit to but one employer is part of this Court's discussion of how and why it is ". . . important that a seaman's connection to a group of vessels in fact be substantial in both (terms of duration *and* nature") (*Id.* at 2190).

The examples given from p. 2191 to p. 2192 of *Chandris* involve changes of assignment as between office work ashore and . . . "commitment of the worker's labor to the function of the vessel." This Court observes that ". . . if a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel related work made on the bases of his activities in his new position. *Id.* at 2191-2192, citing *Cheavens, supra,* 64 Tulane L. Rev. 361, 364-365, 389-390 (1989).

Not even the reasoning of *Reeves v. Mobile Dredging & Pumping Co. Inc.*, 26 F.3d 1247, 1256-1258 (3d Cir. 1994) cited and discussed at length on pp. 34-36 of Petitioner's Brief, strictly limits the Fleet Seaman Doctrine to but one employer.

Instead, it observes that ". . . the idea of one control is not entirely definite and will often depend on the circumstances." *Id.* at 1258. Therefore, the connection between the vessels in an identifiable group need not be one employer. In *Reeves*, the two employers involved, Mobile Dredging and Great Lakes Dredging, each had contracts with plaintiff's union. However, when Mr. Reeves was injured he was aboard a Mobile vessel that was not on a navigable body of water. Therefore, it was this non-navigability that vitiated any con-

nection that might have resulted from commonality of union. This is the same distinction made by *Stanfield v. Shellmaker Inc.*, 869 F.2d 521 (9th Cir. 1989) cited by *Reeves*, 26 F.3d at 1258 and fn.16. In *Stanfield*, as in *Reeves*, plaintiff was injured aboard a vessel operating in non-navigable waters. The Ninth Circuit refused to apply the Fleet Seaman Doctrine, not because plaintiff's prior service was not with vessels of the same employer, (which it was) but because the Doctrine cannot be used to connect non-navigable service to navigable. In essence, when one is injured aboard a non-navigable vessel, he is in the position of:

> . . . someone actually transferred to a desk job and in the company's office and injured in the hallway (who is) . . . not entitled to claim seaman status on the basis of prior service at sea" under *Chandris, supra,* 115 S.Ct. at 2191, bottom of the page.

No such problem exists here.

The seminal single employer Fleet Seaman Doctrine case is *Barrett v. Chevron U.S.A. Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1986), quoted on pp. 33-34 of Petitioner's Brief. *Cheavens, supra,* 64 Tulane L. Rev. at 389-390 argues that the *Barrett* analysis is faulty because the percentage of time an employee spends working aboard vessels owned by a particular employer versus the percentage of time on land is not a useful or significant test for seaman status.

Moreover, as is pointed out by *Hall v. Professional Divers of New Orleans*, 865 F.Supp. 363, 365 (E.D. La 1994), *Barrett* did not overrule *Wallace, supra* which finds the nature of the work controlling as to seaman status, regardless of the mber of employers. The fact that *Chandris* cites *Wallace* with approval reinforces the interpretation of *Chandris* made by the decision below.

When one realizes that Mr. Papai's work assignments were made not by his employer, but by his union, it makes no sense to limit changes in assignments to but one employer. Instead, as is visualized by the decision below, where, as here, a group of employers join together to obtain a common labor pool from a union hiring hall, it is entirely logical to extend the "identifiable group" to all vessels owned by each of these employers, which is the effect of the Ninth Circuit's language on 67 F.3d at 207, Pet. App. 8a.

Therefore, the only factor that could deprive this Respondent of seaman status while working under this agreement would be the withdrawal of the vessel from navigation. *Wilander, supra,* 111 S.Ct. at 807. There is no such withdrawal here.

II. THE FORMAL AWARD OF LHWCA COMPENSATION BENEFITS SHOULD NOT PRECLUDE PAPAI'S CLAIM TO SEAMAN REMEDIES

This Court's recognition that the LHWCA and the Jones Act are mutually exclusive compensation regimes, *Chandris, supra,* 115 S.Ct. at 2183, does not mean that Congress intended that proceeding under one act should preclude the other. To give such a meaning leads to an election of remedies. The "plain text" (as the term is used on p. 10 of Petitioner's Brief) of the LHWCA that the liability of an employer for workers compensation is exclusive is undermined by equally plain language that allows the worker to bring a separate tort action for negligence on the part of the vessel upon which he is injured. It is only where, as here, the worker's employer also owns the vessel that the legislative history and the policy underlying the statute require that exclusivity give way to the tort remedy.

The principles of collateral estoppel require that the parties be the same in both proceedings. Unless the employer also owns the ship, the worker could not be precluded from the Jones Act by the LHWCA formal award because the shipowner had not been a party to the ALJ proceedings. Therefore, there should be no preclusion *per se* at any point while both remedies are being pursued.

If there is to be a preclusion *per se* there is no reason for it to occur at the time of a formal award rather than at some other time.

Even if there is to be preclusion *per se* at the time of the formal award, well-settled exceptions to collateral estoppel prevent its application to the case herein.

A. *Civil Suits Against Vessels and LHWCA Remedies are Not Mutually Exclusive*

The Jones Act was the first statute to provide a cause of action for vessel negligence in 1920.

The 1922 Congress passed a statute subjecting land based workers to state compensation. As the Petitioner's Brief observes on p. 13, this Court struck it down, and then interpreted the term "seaman" in the Jones Act "to include stevedores employed in maritime work on navigable waters." *International Stevedoring Co. v. Haverty,* 272 U.S. 50 (1926).

In 1927 the LHWCA was enacted to provide an exclusive compensation remedy for land based maritime workers except for "a master or member of a crew of any vessel," who remained covered by the Jones Act.

Notwithstanding the original exclusivity language in the LHWCA, this Court afforded all maritime workers a seaman's claim for unseaworthiness against shipowners in *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946).

The *Sieracki* decision was overturned by the 1972 amendments to the LHWCA which eliminated unseaworthiness causes of action for all maritime workers except "a master or a member of a crew of a vessel."

However, these amendments retained the right of all maritime workers to assert negligence actions against the owners of ships upon which they have been injured. 33 U.S.C. §905(b).

In its decision of *Chandris, supra,* 115 S.Ct. 2183-2184 this Court has ruled that the LHWCA term "master or member of a crew of a vessel" is a refinement of the term seaman in the Jones Act, so that someone who is a ". . . member of a crew of a vessel" cannot be covered under the LHWCA.

Nevertheless, "a claimant found to be an employee under the LHWCA" is by no means limited to a compensation remedy against his employer, such as Petitioner's Brief argues on pp. 10-15.

Instead, when an employer chooses to own the ship on which his employee is injured, 33 U.S.C. §905(a) must defer to 33 U.S.C. §905(b), under this Court's decision of *Jones & Laughlin Steel Co. v. Pfiefer,* 462 U.S. 524 (1983).

There, as here, the employer contended that the exclusivity provision of 905(a) was paramount, and absolved ". . . it of all other responsibility for damages." *Id.* at 530.

This Court disagreed. In the opinion by Justice Stevens, the availability of seaman's remedies to all maritime workers prior to 1972 was noted. *Id.* at 521 and fn. 7.

This Court concluded that although the 1972 amendments changed the character of a non-seaman maritime worker's cause of action against the vessel by substituting negligence for unseaworthiness, Congress clearly intended to preserve

this right, as was evidenced by unambiguous language in the House Committee Report. *Id.* at 532.

As this Court concluded:

> If respondent had been employed by an independent stevedore at the time of his injury, he would have had the right to maintain a tort action against the vessel. We hold today that he has the same right even though he was in fact employed by the vessel. *Id.* at 532.

In the wake of *Pfiefer,* some shipowner employers continued to argue that its application was restricted to traditional longshoremen. These arguments were rejected by *Guilles v. Sea-Land Service,* 12 F.3d 381, 387 (2d Cir. 1993) which collects decisions from other circuits to the effect that the cause of action in 905(b) is available to non-longshore persons suing an employer-vessel and takes comfort from excerpts of the House Committee Report that rejected an industry proposal that vessels should be treated as joint employers in favor of language holding vessels liable for damages caused by their fault regardless of whether the owner happens to be the workers' employer under the LHWCA.

In summary then, there is nothing in the case law or the legislative history of the LHWCA that dictates an election of remedies so as to make any finding by a Department of Labor ALJ preclusive *per se* of any action against his employer for the same injury.

B. Sharp is Defectively Reasoned

Page 18 of Petitioner's Brief cites *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992) as "the most prominent case "holding that a formal award of LHWCA benefits precludes a further claim to seaman benefits.

In truth, it is the only case that reaches this result under present law.

Fontenot v. AWI, Inc., 923 F.2d 1127, 1132-1133 (5th Cir. 1991), the next case cited on p. 18 of Petitioner's Brief, does not involve a formal award of compensation. Moreover, the Fifth Circuit made it clear that it did not decide the issue of whether a finding of LHWCA coverage sought and obtained by the injured worker should preclude any subsequent action against his employer for the same injury, for two additional reasons. First, because a decision on this issue would not affect the outcome of the case, and second, because the parties had not raised this issue at trial or on appeal. *Id.* at 1133.

Fontenot also inaccurately observes that workers' compensation is the exclusive remedy for all maritime workers covered by the LHWCA. *Id.* at 1132. This observation ignores the fact noted by *Gizoni, supra*, 502 U.S. at 90-92, that some maritime workers may be Jones Act seamen performing a job specifically enumerated under the LHWCA. Since *Fontenot* was handed down several months before this Court's decision of *Gizoni*, this observation incorrectly states the present law.

Hagens v. United Fruit Co., 135 F.2d 842 (2d. Cir. 1943), the third case cited by Petitioner on this issue, long ago ceased to be good law.

It was decided in 1943 when 33 U.S.C. §903(a) still flatly provided that compensation was not payable in respect of the disability of a member of a crew of any vessel. A finding as to nonmembership of a crew of a vessel was what was then called a "finding of jurisdictional fact." Id. at 843. The rule in *Hagens* was based on preemptive jurisdiction, not collateral estoppel. Such strictures have long since been removed by Congress.

33 U.S.C. §903(a) was amended, together with the rest of the Act, in 1972, and, again in 1984 and no longer speaks of crew members. Those amendments changed what was essentially only a situs test of eligibility for compensation to one looking to both the situs of the injury and the status of the injured party. *Northeast Marine Terminal Co. Inc. v. Caputo*, 432 U.S. 249, 264-265 (1977).

Ever since the 1984 amendments, the so-called crew member exclusion has resided among the Act's status provisions in 33 U.S.C. §902(3)(G) where it is stated as a statutory exception to the definition of a covered employee. Rather than posing questions of jurisdictional fact, the modern status test merely presents issues of coverage. *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353, 1359 (9th Cir. 1981).

Finally, *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995), cited on p. 19, fn. 22 of Petitioner's Brief and at fn. 6 of the decision below, certainly does not hold that a formal award of LHWCA benefits precludes a further claim for seaman remedies. Instead, it holds that a formal award of compensation *does not* bar a claimant from Jones Act relief, at least when the record does not reflect an express finding that the claimant was not a "master or member of a crew." *Id.* at 315.

One reason why *Sharp* reaches a result contrary to the decision below is its misapplication of the reasoning of *Gizoni, supra*.

The decision below, 67 F.3d at 206-207, Pet. App. 10a-11a, focuses on this Court's two statements in *Gizoni* that:

> (1) . . . the LHWCA clearly does not comprehend . . . a preclusive effect (by way of collateral estoppel) as it specifically provides that any amounts paid to an employee for the same injury, disability or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA (and)

> (2) . . . where full compensation credit removes the threat of double recovery, the critical element of detrimental reliance does not appear. (Citations omitted.) Argument by amicus would force injured maritime workers to an election of remedies we do not believe Congress to have intended. *Id.* at 207, 11a (emphasis added).

It is certainly logical to extend this language to its "next step" as did the decision below, 67 F.3d at 208, Pet. App. 12a. Petitioner's Brief p. 20 at fn. 20 argues that such a step ". . . is not a logical one" but fails to explain why.

Sharp, largely disregarded this reasoning, focused on the fact that *Gizoni*'s benefits had "never actually been litigated", and ignored this Court's language quoted above as to the "preclusive effect" that the LHWCA never intended and the absence of detrimental reliance by removing ". . . the threat of double recovery."

It also outrightly rejects the teachings of its own decision of *Simms v. Valley Line Co.*, 709 F.2d 409 (1983) cited in *Gizoni*, where the arguments of legal scholars were quoted:

> . . . who argued that even the payment of benefits pursuant to a formal award in a contested proceeding might not be fatal to a Jones Act action if the compensation award was made without a proper adjudication of the claimant's status as a harbor worker." 973 F.2d at 425.

An analysis of *Simms* suggests that the Fifth Circuit was well on its way to the result reached by the decision below before it was derailed by its dissatisfaction with counsel in *Sharp*.

Mr. Simms was a night watchman who fell into an open hold on a barge owned by his employer, Valley Line Company. He

brought suit under the Jones Act and also filed for LHWCA benefits because he was uncertain as to whether his duties tending the barge made him a member of its crew.

In his LHWCA proceeding, an ALJ determined that Mr. Simms was not a member of the barge's crew and awarded him benefits. The compensation carrier appealed. The BRB dismissed the claimant from the appeal because he was not adversely affected, just as it probably would have done in the present case had Mr. Papai realized the potential effect of *Sharp* (decided on September 25, 1992) on his ALJ decision and appealed it in the time that elapsed after his civil trial had been completed (September 17, 1992) but before December 16, 1992, when it was argued and decided and the time to appeal the ALJ decision to the BRB had expired (as of October 27, 1992).

In any event, Mr. Simms, concerned with the effect of the ALJ ruling on his Jones Act suit, petitioned the Fifth Circuit for review of the BRB's decision to dismiss him from the compensation carrier's appeal. *Id.* at 411.

The Fifth Circuit recognized the "zone of uncertainty" between the Jones Act and the LHWCA and the requirement that each of them ". . . requires a liberal application in favor of claimant to effect its purposes." *Id.* at 411.

It then discussed the "arguments of legal scholars" deliberately disregarded in *Sharp* and relied upon in *Gizoni*, 122 S.Ct. at 494, text accompanying fn. 5, to the effect that a former award should not preclude a Jones Act suit. 709 F.2d at 412 and fns. 3 and 5.

However, *Simms* stopped short of actually deciding that a formal order would not be preclusive by finding that the BRB dismissal of the claimant was not a "final order" in view of the compensation carrier's ongoing appeal of the ALJ's award of

LHWCA benefits, and dismissed claimant's petition to review the ultimate outcome of the BRB proceedings as premature.[4] *Id.* at 413.

Perhaps more significantly, the *Simms* court observed (*Id.* at 413 and fn.6) that it was

> . . . entirely possible . . . that the district court might refuse to give collateral effect to the status determination here made for purposes of the compensation act.

In the present case when the ALJ made his decision that Mr. Papai was not a member of the crew of a vessel, *Simms* left the District Judge free to refuse collateral estoppel ***had the ALJ decision been brought to his attention***, as it should have under Petitioner's interpretation of *Sharp*. The fact that it was not[5] is closely analogous to the failure of the parties in *Sharp* to inform the Fifth Circuit of the approved settlement that appears to have heavily influenced it into reaching the ill-advised decision upon which the present petition is founded.

The following analysis of *Sharp's* convoluted and unique procedural history suggests another reason why *Sharp* reached such an ill-reasoned result.

The plaintiff there, Earnest Sharp, initiated administrative proceedings with the deputy commissioner shortly after his November 1985 accident. After the deputy commissioner notified the parties that the injury "appear[ed] to fall under the jurisdiction of the [LHWCA]", *Sharp, supra*, 973 F.2d at 424, the employer began to pay voluntary benefits. In November of 1986, however, Sharp filed a parallel Jones Act suit in District Court. The employer promptly terminated LHWCA benefits, and "raised the defense that Sharp was a Jones Act seaman and thus not eligible for longshore compensation." *Id.* The parties did not request an ALJ hearing, but pushed the District Court case to trial instead.

In June of 1989, the District Court granted the employer a directed verdict in Sharp's Jones Act case "on the grounds that the barges were not vessels and that he was not a seaman." *Id.* Sharp appealed that determination to the Fifth Circuit the following October. By September of 1989, however, Sharp had settled his LHWCA claims for $225,000. A final release was executed on October 5, 1989 (just as the Jones Act case was being transferred to the Court of Appeals), and the ALJ promptly approved the settlement. *Id.* But the parties never advised the Court of Appeals of their agreement. In November of 1990, the Fifth Circuit therefore reversed the directed verdict and remanded the case for another trial "on the ground that a fact question existed as to whether Sharp worked aboard a fleet of vessels and thus was a seaman.

On remand, the District Court granted the employer summary judgment on grounds that Sharp's LHWCA settlement comprised an election against his Jones Act rights. *Sharp, supra*, 973 F.2d at 424-425. The Fifth Circuit affirmed under the doctrine of equitable estoppel, ruling that "where the ALJ issues a compensation order ratifying a settlement agreement, a 'formal award' should be deemed to have been made under *Gizoni*, and the injured party no longer may bring a Jones Act suit for the same injuries." *Id.*, at 426.

The result and rationale in *Sharp* appear at least, in part, to reflect the Fifth Circuit's weariness with the case and an

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[4]This approach would not be likely today bcause of the administrative affirmance of longstanding appeals of ALJ decisions ot the BRB effected as of September 11, 1996, by Public Law 104-106.

[5]As is shown by *Explosives Corp of America v. Garlam Enterprises*, 817 F.2d 894, 900-902 (1st Cir. 1987) cited and discussed in the 1996 supplement to 18 *Wright, Miller and Cooper, supra*, §4404 p. 28 & fn. 21, it is inexcusable for a litigant to fail to raise the preclusive effect of a decision in another tribunal before the district court renders judgment and then assert it on appeal. The doctrine of laches applies to such conduct. *Id.* at 901.

annoyance with the tactics that brought it there. As the Fifth Circuit noted:

> . . . [W]e are distressed by the conduct of the attorneys for Sharp, Johnson Brothers, and Wausau during [a] previous appeal. Although we have no basis upon which to ascertain their motives, we are surprised that the parties failed to bring to our attention the fact that they had settled at least one aspect of their dispute. We recognize that counsel may legitimately have believed that the LHWCA settlement was irrelevant to the Jones Act action. Nevertheless, candor and respect for this court would dictate that the parties inform us of so significant a development in their litigation. *Sharp, supra,* 973 F.2d at 427, fn. 3.

In the present case, although *Sharp* had been decided on September 25, 1992, Petitioner did not inform the trial judge on or before December 16, 1992, that the ALJ decision on August 27, 1992, as affected by the reasoning of the Fifth Circuit decision (of *Sharp*), precluded Mr. Papai from appealing his Jones Act status, contrary to the belief that he was "free to appeal" expressed on the record by the District Judge in open court. (J.A. 82).

It seems possible that Petitioner may have decided not to mention the potentially preclusive effect of the ALJ decision to the trial judge to give itself a fall-back position in the event that the district court would be reversed on the status issue. Fortunately for Respondents, however, not only laches, but also well-settled exceptions to collateral estoppel, to be discussed *infra*, will not allow such conduct to succeed.

C. There is Nothing About the Nature of a Formal Award that Should Make it Preclusive Per Se

In *Pallas Shipping Agency Ltd. v. Duris,* 461 U.S. 529 (1983) this Court ruled that a worker's acceptance of voluntary compension benefits did not give rise to the assignment of his claim for negligence against the shipowner to his employer.

This Court traced the legislative history and case law and concluded that nothing short of a formal order could lead to such an assignment. 461 U.S. at 535.

The Court observed that although the LHWCA is generally a covered worker's exclusive recovery from his employer, the worker ". . . does not relinquish any claim against the shipowner, charterer or other third party."

When the LHWCA was originally enacted in 1927, the injured worker was required to elect between the receipt of compensation and a damages suit against a shipowner. In 1938 the LHWCA was amended to delete this election of remedies. *Id.* at 536 and fn. 4.

This Court observed that the requirement of a formal award was designed to protect the worker from the unexpected loss of his rights against a negligent third party.

The opinion quotes from the House Committee Report of the 1938 amendments as to the severe injustice that could result from acceptance of compensation benefits without knowledge of the effect upon one's rights. 461 U.S. at 536.

The opinion goes on to explain how the 1959 amendments deleted all election of remedies requirements from the act. 461 U.S. at 537 and fn. 5.

Therefore, not only was it improper to fail to raise the preclusive effect of the ALJ decision in the trial court, it would

compound the error committed by the decision below in considering it on appeal by forcing an election on this basis.

D. Even if There Were an Election Doctrine and Even if it Applied to the Time of a Formal Order, Well-Settled Exceptions to Collateral Estoppel Prevent its Application Here

1. There is Nothing in the LHWCA That Shows That Congress Intended That an ALJ Formal Award Would Preclude a Jones Act Suit.

Under the principles of *Astoria Fed. Sav. and Loan v. Solomino*, 501 U.S. 104, 111 S.Ct. 2166 (1991) and the long-standing legislative history and judicial interpretations discussed earlier in this brief, there is nothing in the LHWCA that shows that Congress ever intended to force an injured worker into an election of remedies, the interpretation sought by Petitioner herein.

Contrary to what is argued on p. 23 of Petitioner's Brief, the text of §905(a) as to exclusive liability is not intended to be absolute. The text of §905(b) preserves third-party tort remedies against the employer if he is also the owner of the ship upon which the injury occurs.

This is the situation here, and, thus HTB's discussion about other cases where third party liability is not available simply misses the mark.

Moreover, there would be no reason to include language about the Jones Act in §903(e) if Congress intended that a formal award would preclude a Jones Act Suit. Given both §903(e) and §905(b) the inference is clear that §905(a) is not absolute, contrary to what is argued on p. 24 of Petitioner's Brief.

Ultimately, this Court has already held that Congress did not intend to force an election of remedies when it provided

that any sums paid under the Jones Act would be a credit against any liability imposed by LHWCA. *Gizoni, supra*, at fn. 5.

2. Petitioner Has Not Proved That This Issue Was Actually Litigated

Page 21 of Petitioner's Brief recognizes that one requirement of collateral estoppel is that ". . . the issue (be) actually litigated in the administrative proceeding."

Collateral estoppel is an affirmative defense, so that the party seeking preclusion has the burden of proving said litigation. *Freeman United Coal Mine Co. v. OCWP*, 20 F.3d 289, 293 (7th Cir. 1994). This Petitioner cannot do.

Instead, it appears that Petitioner did all it could at the ALJ hearing to make sure that Papai was not found to be a "member of a crew". It certainly introduced no evidence nor made any argument to the contrary. Therefore, it cannot bear the burden of proving that the issue was actually litigated.

A review of the ALJ's Decision and Order counter-indicates such litigation. The employer argued that the ". . . claimant may have been a Jones Act seaman." (Pet. App. 35a) but provided orders from the District Court showing that he was not. (*Id.* at fn.2).

The only evidence upon which the ALJ relied was Mr. Papai's testimony that he lived on the shore, not the ship and had assignments of only one days' duration. The ALJ then applied this testimony to a pre-*Wilander* BRB decision and concluded that Mr. Papai was not a member of a crew. (Pet. App. 37a). This is hardly "actual litigation."

3. *The Later ALJ Decision Cannot Be Used to Preclude Appeal of the District Judge's Ruling on Seaman Status*

Freeman United, supra also poses " a more fundamental problem" to the assertion of collateral estoppel in the present case. *Id.* at 294.

This problem is that a decision in a second proceeding in another tribunal cannot act to affect the eventual outcome of an earlier one. This concept is discussed in detail in 18, *Wright, Miller and Cooper, Federal Practice and Procedure* §4404 at 30 (1981), as augmented by its 1996 supplement, citing later cases in fns. 19, 20 and 21.

Practically speaking, this means that, regardless of what the ALJ or the compensation attorneys may have thought, the ALJ decision cannot be used to affect the eventual outcome of the district judge's original decision that Mr. Papai was not a Jones Act Seaman when he was injured. In a way, this is obvious. This ALJ's decision " . . . should not reach backward by way of preclusion . . .." *Cycles Ltd. v. Navistar Fin. Corp.*, 37 F.3d 1088 (5th Cir. 1994), cited by *Wright, Miller and Cooper, supra* at fn. 21.

4. *In the Event that this Court Decides to Follow the Reasoning of Sharp, it Should Not Be Used to Preclude Respondents Herein*

In the final analysis, collateral estoppel is a discretionary doctrine that only applies under the law existing at the time that the decision was made. *Brock v. Williams Enterprises of Georgia Inc.*, 832 F.2d 567, 574 (11th Cir. 1987) explaining *Commissioner v. Sunnen*, 333 U.S. 591 (1948) in light of Restatement (Second) Judgments §28 (2)(b) (1982).

On August 27, 1992, the only reported case in the country that had addressed the Issue, *Simms*, suggested that the Fifth

Circuit was on its way to deciding that a formal award would not be preclusive. If this Court now decides to follow the reasoning of *Sharp*, the ALJ decision should not be given preclusive effect because the application of such reasoning would be a "change of legal principles" from what existed on August 27, 1992.

This doctrine is also mentioned in Justice White's concurring opinion in *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 180 and fn. 1 (1984) as an application of Restatement (Second) Judgments §28 Comment C (1982) as follows:

> . . . relitigation is not precluded if the issue is one of law and . . . (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or to avoid inequitable administration of the laws . . .

If this Court decides to give preclusive effect to ALJ rulings in Jones Act cases that a claimant is not a "member of a crew," such decision should not be made applicable to the present ALJ ruling because there was no way that any ALJ on August 27, 1992, could know that his ruling would have this effect. For this Court to follow the reasoning of *Sharp* instead of the reasoning of *Simms*, upon which the ALJ had a right to rely (as the only decision in the county on the subject at the time) would represent an intervening change in the applicable legal context that would make it inequitable to apply it herein. This is an alternative ground for affirmance.

CONCLUSION

The Court of Appeals should be affirmed.

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